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No. 12278

In the United States Court of Appeals for the Third Circuit

JAMES P. MITCHELL, SECRETARY OF LABOR, UNITED STATES DEPARTMENT OF LABOR

v.

KENNETH E. RENNEKAMP INDIVIDUALLY AND D/B/A RADIO STATION WEMR, APPELLANTS

APPEAL FROM A JUDGMENT OF THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR APPELLEE AND APPENDIX

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COUNTERSTATEMENT OF THE CASE

Because of the omissions of material facts from defendant's statement of the case, this counterstatement is necessary.

The employees who were found to have been underpaid in violation of the Act are those engaged at defendant's radio station in Emporium, Pennsylvania, who are employed as announcers, engineers, or combination announcer-engineers. They edited and rebroadcast news reports at regular intervals throughout the day (Fdg. 36b), operated and maintained the transmission equipment (Fdg. 37b), announced and presented the programs (Fdg. 37b), prepared the commercials (Fdg. 37b), and sold the advertisements from which the entire income of the station was derived (R. 31b; Fdg. 37b).

Defendant is a member of the Associated Press, and has an Associated Press teletype at its radio station (Fdg. 35b, 36b). Over this machine, the station receives news gathered by the Associated Press from all points of the United States and throughout the world (Fdg. 36b). This news comes in over the machine 24 hours a day, every day except Sunday (Fdg. 36b). In addition, cables, messengers and the mails are used as communications, both in receiving and transmitting news to and from the Associated Press and its membership (Fdg. 36b). Defendant broadcasts this news over his radio station throughout the day, for periods ranging from one minute to

15 minutes at a time (R. 2b, 3b, 17b). In addition, defendant receives at the station reports of football and baseball games, originating outside the State, and rebroadcasts these reports (R. 3b).

The testimony of the employees uniformly disclosed that the employees had worked many hours over and above those recorded on their time sheets, principally in selling advertising (R. 2b, 19b) but also in connection with the presentation of station programs and operation and maintenance of the transmission equipment (R. 16b, 17b), and that the employees were not compensated for these hours. Defendant's evidence in rebuttal was his own testimony that he had never authorized any such work, had specifically advised the employees not to work beyond the hours scheduled, and that the credibility of the employees' testimony is doubtful because of certain inconsistencies in it (Deft.'s Br. pp. 17–21; R. 23b).

In addition, defendant testified that even if hours beyond those reported on the time sheets were worked, such work was concealed from him by the employees, so that a violation of the Act could not be imputed to defendant (Deft's Br. pp. 23–28). On this point, the testimony of the employees was that defendant required and expected them to sell advertising (which accounted for a large proportion of the extra hours worked) (R. 1b, 5b, 19b), that defendant had instructed the employees not to place on the time sheets more hours than the fixed weekly schedule which had been established for each employee even though additional hours might be worked by the employees (R. 2b, 11b, 12b, 18b), and that occasionally the hours on

the time sheets did not accurately reflect the portion of the day actually worked because to do so would indicate that more than one employee had been working at the station at the same time and defendant disapproved of such "overlapping" (R. 18b).

While the radio station here involved has been closed since the Department's investigation, defendant continues to maintain an interest in several other broadcasting stations, and with respect to one of these stations, an injunction has previously been issued against violations of the Act (Fdg. 40b). Also, at the time of the trial, though the power had been disconnected and the tower removed, the station building remained serviceable, and the transmission equipment still remained in it (R. 30b).

On these facts, the trial court held that the employees were covered by the Act, that the preponderance of the credible evidence indicated that defendant had violated the Act by permitting employees to work hours not recorded on their time sheets for which they received no payment, and that the closing of the station did not render the action moot (R. 40–42b). Accordingly, it enjoined defendant from violating the Act in the future (R. 6a).

ARGUMENT

I. The court below was plainly correct in holding Defendant's radio broadcasting to be interstate commerce within the scope of the Fair Labor Standards Act

Defendant argues that it is "highly doubtful" whether its broadcasting station is engaged in interstate commerce because of its low power and because its radius was limited to 10 miles in any given direc-

tion. There are two conclusive answers to this contention: (1) regardless of the power or radius of the station's broadcasting, the regular and continuous receipt and transmission of news and information continuously coming by teletype from sources outside the State suffices to bring defendant's employees within the coverage of the Act, and (2) the consistent judicial recognition that radio broadcasting cannot practicably be confined within State lines, and is, by its very nature, interstate commerce.

1. As the court below concluded, the regular receiving, reading, editing and broadcasting of news from out-of-state sources continuously received via Associated Press teletype machine, "which was in operation at defendant's radio station on a 24 hour basis" (deft's appx. 4a), was sufficient to bring defendant's employees within the coverage of this Act, on the authority of the Supreme Court's decisions in *Lorain Journal* v. *United States*, 342 U. S. 143; *Associated Press.* v. *United States*, 326 U. S. 1; *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103; see also *Western Union* v. *Foster*, 247 U. S. 105. In the *Lorain Journal* case, the Supreme Court, not only ruled that "[t]here can be little doubt today that the immediate dissemination of news gathered from throughout the nation or the world by agencies specially organized for that purpose is a part of interstate commerce" [342 U. S. at 151], but specifically held that the "local dissemination" within the state of such news "to the reading public *is an inseparable part of the flow of the interstate commerce involved*" [*id.* at 151–152, emphasis added]. In so ruling, the

Court expressly declined to rely on the "suggestion that the out-of-state distribution of some copies of the Journal * * * provided, in any event, a sufficient basis for classifying the publisher's entire operation as one in interstate commerce," stating that it was not necessary to rely on this ground (*id.* at 150).

Such continuous and immediate transmission of out-of-state news and information is, also, plainly within the scope of the statutory definition of "commerce" in the Fair Labor Standards Act, which expressly includes "transportation, transmission, or communication" among the several States.[1] It has long been settled that this definition extends "throughout the farthest reaches of the channels of interstate commerce" (*Walling* v. *Jacksonville Paper Co.*, 317 U. S. 564; *Overstreet* v. *North Shore Corp.*, 318 U. S. 125), and more specifically that it extends beyond the point of a temporary or intermediate pause to include the "entire * * * practical continuity of movement" to the intended destination (*Jacksonville Paper*, at 568–569; *Walling* v. *American Stores Co.*, 133 F. 2d 840, 845–846 (C. A. 3)), as well as activities "so closely related to the interstate movement" or "to the functioning of an instrumentality or facility of interstate commerce as to be, in practical effect, a part of it" (*Overstreet*, 318 U. S. at 130; *Mitchell* v. *Vollmer*, 349 U. S. 427 at 429).

The *Lorain Journal* decision's description of the dissemination of out-of-state news to the local read-

[1] Section 3 (b) defines "commerce" as meaning "trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof."

ing public as "an inseparable part of the flow of the interstate commerce involved" meets so precisely the above quoted tests of this Act's "in commerce" coverage, that there can be no serious doubt of the correctness of the decision below that the *Lorain* decision is controlling here.

Apparently defendant does not deny that the continuous receipt of incoming interstate communications for almost instantaneous transmission to radio listeners is part of the "practical continuity of [interstate] movement" (*Jacksonville Paper, supra*), or that it is any the less "an inseparable part of the flow of the interstate commerce involved" than was the "local dissemination" of news in the *Lorain Journal* case. Instead, defendant attempts to distinguish the *Lorain* decision by emphasizing that the newspapers there were "*sold* * * * for *profit*" (br., p. 8). But clearly this is no ground for concluding that defendant's receipt and broadcasting of out-of-state news is not part of the interstate commerce covered by this Act (even assuming, which the record in this case does not disclose, that defendant's news broadcasts were not sponsored and hence not profitable). For it is settled that the interstate commerce covered by this Act is not limited to "commercial" transactions or to "articles that are intended for sale, exchange, or other trading activities." See *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 512. See also *Mitchell* v. *Pilgrim Holiness Church Corp.*, 210 F. 2d 879 (C. A. 7), certiorari denied, 347 U. S. 1013 (holding within the coverage of the Act the printing of religious materials

primarily for Sunday Schools and other branches of the Church's organization).

Newspapers have consistently been held to be within the coverage of this Act in reliance upon the reasoning of the *Associated Press* and *Lorain* decisions. See *Walling* v. *Sun. Pub Co.*, 47 F. Supp. 180, at 191, para. [5]. (W. D. Tenn. 1942), affirmed, 140 F. 2d 445, 448 (C. A. 6), certiorari denied, 322 U. S. 728; *Fleming* v. *Lowell Sun Co.*, 36 F. Supp. 320, 326 (D. Mass. 1940), vacated on other grounds, 120 F.-2d 213 (C. A. 1), affirmed *per curiam*, 315 U. S. 784; *McComb* v. *Dessau*, 89 F. Supp. 295 (S. D. Cal. 1950); *Fleming* v. *A. H. Belo Corp.*, 36 F. Supp. 907, 909 (N. D. Tex. 1941), affirmed, 121 F. 2d 207 (C. A. 5), 316 U. S. 624; *Fleming* v. *Gazette Pub. Co.* (not officially reported), 1 WH Cases 613 4 Labor Cases Para. 60,452 (N. D. Ohio, 1941).[2] Thus the district court in the *Sun Publishing* case, *supra*, specifically held that employees engaged in receiving, printing and circulating "news, information and intelligence from nation-wide and world-wide sources are engaged in interstate transmission and communication of news and are, therefore, engaged in interstate commerce within the meaning of the Fair Labor Standards Act" (47 F. Supp. at 191). The Sixth Circuit, in affirming, expressly ruled that the contention that appellant's newspaper was not within the Act's coverage "must be rejected on the authority * * * of *Associated Press* v. *National Labor Relations Board*" [301 U. S. 103], stating that "it is unimportant that only

[2] Reversed on consent of the parties by C. A. 6, April 14, 1942, for a procedural reason not pertinent here; order of appellate court unreported.

a small percentage of appellant's newspaper are sent out of the state" (140 F. 2d at 448). Similarly in the *Lowell Sun* case, *supra*, the district court found the reasoning of the Supreme Court's *Associated Press* decision sufficient to make it clear that this Act covered the newspaper's employees and that "the percentage or number of newspapers * * * that crossed state lines is not controlling on the question of whether or not the respondent is engaged in commerce between the states" [36 F. Supp. at 326]. And exclusive reliance was placed upon the receipt and transmission of news originating from out-of-state sources in *McComb* v. *Dessau, supra*, where the court held that, although employees of a newspaper, "because of the purely local circulation, * * * may not be engaged in 'the production of goods for commerce,' their activities *in * * * incorporating into such production news and materials gathered and originating outside the state, place them in the category of employees 'engaged in commerce'*" (89 F. Supp. at 297, emphasis added).

Since the transmission of news by radio broadcasting is even more "immediate" than its dissemination by newspapers (see *Lorain Journal* decision, *supra*, 342 U. S. at 152), and is plainly "as continuous and rapid as science can make it" (see *Western Union* v. *Foster, supra*, 247 U. S. at 113) the "local" transmission of out-of-state news by radio broadcasting would seem, *a fortiori*, "an inseparable part of the flow of the interstate commerce involved" (see *Lorain Journal, supra*, at 151–152), and therefore interstate commerce within the scope of this Act. This has evidently been

recognized by the courts, which have uniformly held or assumed without question that the Act is applicable to radio broadcasting stations. *Mitchell* v. *Hodges Contracting Co.*, 238 F. 2d 380 (C. A. 5); *Wilson* v. *Shuman*, 140 F. 2d 644 (C. A. 8); *Walling* v. *Sun Publishing Co.*, 47 F. Supp. 180 at 182 (W. D. Tenn. 1942); *Fleming* v. *A. H. Belo Corp.*, 36 F. Supp. 907 (N. D. Tex. 1941); *Fleming* v. *Capital Broadcasting Co.*, (not officially reported) 1 WH Cases 486, 3 Labor Cases Para. 60,340 (M. D. Ala. 1941); *Mitchell* v. *Monahans Broadcasters* (not officially reported), 11 Wage Hour Cases 767, 24 Labor Cases, para. 68,090 (W. D. Tex. 1953); *Cummins* v. *Carteret Broadcasting Company*, 137 F. Supp. 547 (E. D. N. C. 1956). It is significant that there is not a single decision to the contrary on the coverage of either newspapers or radio broadcasting stations. Indeed, even where the coverage of a newspaper's employees has been contested, coverage of employees working for an affiliated broadcasting station has been conceded. See *Walling* v. *Sun Publishing Co., supra*, 47 F. Supp. at 182. Apparently the Act's applicability to radio broadcasting is so clear on the additional ground discussed *infra* under (2), that it has been generally recognized and accepted without serious contest throughout the almost 20 years this Act has been in effect.

2. Defendant's inability to find "a single case wherein the applicability of the Fair Labor Standards Act to small radio stations was raised, contested, or directly in question" (see br., p. 5) is entirely understandable, in view of the long-standing consistent judicial recognition that all radio broadcasting, re-

gardless of the location, power or size of the station, unavoidably crosses state lines and is necessarily an integral and inseparable part of the interstate broadcasting channels. This was emphasized in the earliest judicial decisions relating to radio broadcasting, dating back more than a quarter of a century ago and antedating the enactment of the Fair Labor Standards Act, and has been consistently reaffirmed by the courts throughout the years up to the most recent decisions.

As the Supreme Court pointed out in its earliest decisions upholding the Federal power to regulate radio communication as interstate commerce, "[n]o state lines divide the radio waves" (*Radio Commission* v. *Nelson Bros. Co.*, 289 U. S. 266, 279), and "[b]y its very nature broadcasting transcends state lines and is national in its scope and importance" (*Fisher's Blend Station* v. *Tax Com'n.*, 297 U. S. 650, 655).[3] This scientific fact is as true today as it was at the time of those Supreme Court decisions, as has been consistently recognized by subsequent, as well as the prior, court decisions. See *Allen B. Dumont Laboratories* v. *Carroll*, 184 F. 2d 153, 154 (C. A. 3), certiorari denied, 340 U. S. 929; *Station WBT* v. *Poulnot*, 46 F. 2d 671 (E. D. S. Car. 1931); *American Bond & Mortgage Co.* v. *United States*, 52 F. 2d 318 (C. A. 7); *United States* v. *Gregg*, 5 F. Supp. 848, 858 (S. D. Texas 1934); *Whitehurst* v. *Grimes*, 21 F. 2d 787 (E. D. Ky.

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[3] Thus *all* radio broadcasting stations, regardless of their size or radius of operation, must be licensed by, and are subject to regulation under, the Federal Communications Act (47 U. S. C. A., Secs. 151 et seq., and 301 et seq.).

1927); *City of Atlanta* v. *Southern Broadcasting Co.*, 184 Ga. 4, 190 S. E. 594, 596–597 (Sup. Ct. Ga. 1937). See also *City of New York* v. *Federal Radio Commission*, 36 F. 2d 115 (C. A. D. C.).

Thus this Court, in the *Allen B. Dumont* case, *supra*, (decided Sept. 1950), ruling that "there can be no doubt of the correctness" of the construction of the term "radio communication" to include "television as 'one form of radio transmission'" (184 F. 2d at 155), stated unqualifiedly (*id.* at 154):

> There is no doubt but that television broadcasting is in interstate commerce. This is inherent in its very nature.

The consistent line of *radio* broadcasting decisions, with not "a single authority holding to the contrary" (see *American Bond & Mortgage* decision, *supra*, 52 F. 2d at 322), have similarly emphasized the inherent interstate nature of all radio broadcasting. As stated in one of the earliest court decisions involving a small amateur radio station: "Radio communications are all interstate. This is so, though they may be intended only for intrastate transmission." *Whitehurst* v. *Grimes*, 21 F. 2d 787 (E. D. Ky., Sept. 17, 1927). Citing with approval the *Whitehurst* decision, *inter alia*, the three-judge court in *Station WBT* v. *Poulnot*, *supra*, ruled that "There can be no doubt that communications by radio constitute interstate commerce," and that the contention "that all radio communication is necessarily interstate * * * in the present state of the art * * * appears to be correct" (46 F. 2d at 675). Like the Supreme Court decisions (*supra*) which followed a few years later, the Court in the *Poulnot* case

relied on the inherent nature of radio broadcasting, pointing out that "the art of radio broadcasting consists in transmitting electro-magnetic waves set in motion by electricity at a station and passing through space to numerous receiving instruments * * * and it is impracticable to confine them, at least in the present state of the art, within state lines. * * *All radio communication, anywhere in the United States, travels actually or potentially across state lines * * *" (*id.* at 672). In similar vein, the Georgia Supreme Court in the *City of Atlanta* case, *supra*, pointed out:

> In so far as radio communication is concerned, at its present state of development, there can be no physical division of intrastate and interstate communications. The transmission of the communication over the "ether" is an indivisible movement. No state lines divide the radio waves (190 S. E. at 596).

Thus, far from it being "highly doubtful" whether defendant's station was engaged in interstate commerce, the above consistent line of judicial decisions would seem more than adequate to establish that its station was unavoidably and necessarily engaged in interstate commerce.

While the above decisions involved the plenary constitutional power to regulate commerce (which would include all activities "affecting commerce"), whereas the Fair Labor Standards Act concededly is not coextensive with the full constitutional power, the explicit recognition by the courts that radio broadcasting does not merely affect interstate commerce, but is such commerce itself, makes them directly apposite to

the construction of the "in commerce" coverage of this Act. As the Supreme Court took pains to point out in *Overstreet* v. *North Shore Corp.*, 318 U. S. 125 at 128:

> But the policy of Congressional abnegation with respect to occupations affecting commerce is no reason for narrowly circumscribing the phrase "engaged in commerce." We said in the *Jacksonville Paper Co.* case, *supra,* [317 U. S. 564], "It is clear that the purpose of the Act was to extend federal control in this field throughout the farthest reaches of the channels of interstate commerce."

Since it is evident that any radio broadcasting is necessarily through the medium of interstate broadcasting channels and is unquestionably so intimately related to the proper functioning of these interstate channels as to be an inseparable part of them, we submit that this Act's coverage of all radio broadcasting cannot seriously be questioned. As noted above, p. 9, this has evidently been the generally accepted view and explains the absence of cases in which coverage of small radio stations has been seriously contested. As evidenced by the decisions cited *supra,* pp. 8–9, the Act has frequently and uniformly been held or assumed to be applicable to the operation of radio broadcasting stations, regardless of their size.[4] In *Fleming* v. *A. H. Belo Corporation,* 36 F.

[4] Although not indicated in the court's opinion, the public records of the Federal Communications Commission show that the radio station involved in *Fleming* v. *Capital Broadcasting Company* was licensed (license No. Br. 997) for a power of only 100 watts to serve the local needs of the city of Montgomery.

Supp. 907, 909, (N. D. Tex. 1941) one of the earliest decisions in which the question of coverage of radio broadcasting under this Act was raised, the court summarily brushed the question aside with the observation: "Radio is interstate commerce, that has been decided long ago by this court * * * when the radio cases first came up, and it never has been questioned, that I know of." This observation, made in 1941, is just as true to this day, so far as the judicial, as well as the legislative and administrative, authorities are concerned.

It has been the consistent administrative interpretation, since the Act went into effect almost 20 years ago, that "employees in the telephone, telegraph, *radio* and transportation industry" are engaged in interstate commerce within the scope of this Act, "since these industries serve as the actual instrumentalities and channels of interstate commerce." See Interpretative Bulletin No. 1, "General Statement as to the coverage of the Fair Labor Standards Act of 1938," originally issued October 12, 1938. Succeeding editions of this Bulletin in 1940, 1942, 1947 and the 1950 edition currently in effect, 29 CFR, para. 776.10, have reasserted the same interpretation with the addition of the "television" and "shipping" industries as being among the obvious and typical examples of activities "in commerce."

The inability of defendant's counsel to find any case contesting the applicability of the Act to small radio stations, far from lending any support to its contention, attests the general recognition of the soundness of the administrative interpretation. In-

deed, since Congress, in the 1949 Amendments to this Act, did nothing to change the administrative interpretation in this respect, this administrative interpretation was among those approved by the express legislative provision in Section 16 (c) of the amending Act that all administrative orders, interpretations and regulations then outstanding and not inconsistent with the 1949 amending Act "shall remain in effect." See Section 16 (c) of the Fair Labor Standards Amendments of 1949, reproduced in the Appx., *infra*, p. 34.

The Supreme Court has relied upon Section 16 (c) of the Fair Labor Standards Amendments to uphold three prior administrative interpretations of the Act. See *Alstate Construction Co.* v. *Durkin*, 345 U. S. 13, 16–17; *Maneja* v. *Waialua Agricultural Co.*, 349 U. S. 254, 270; *Steiner* v. *Mitchell*, 350 U. S. 247, 255. The interpretations upheld in the first two of these cases, though outstanding in 1949, represented a change from a prior administrative interpretation, whereas the interpretation in issue here not only represents the earliest "contemporaneous construction of [the] statute by the [official] charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new" (*United States* v. *American Trucking Associations*, 310 U. S. 534, at 549; *Skidmore* v. *Swift & Co.*, 323 U. S. 134), but has been consistently adhered to throughout the years. Since it is plainly not inconsistent with the 1949 Amendments, the *Alstate* and *Waialua* rulings apply, *a fortiori*, here.

II. There is no merit in defendant's contention (raised for the first time on this appeal) that application of the Act to its broadcasting station would violate the Fifth Amendment to the Constitution because of the statutory exemption granted certain small newspapers

Apart from the question of the propriety of raising, for the first time on appeal, what is in effect a claim to exemption from the Act, appellant's claim to such exemption patently has neither statutory nor constitutional basis. Admittedly, there is no exemption in the terms of the statute for radio broadcasting stations of any kind, and it is too well-settled to require argument that any exemption from this Act must be strictly construed and limited to employees "unmistakably within its terms and spirit." *Phillips Co., Inc.* v. *Walling*, 324 U. S. 490, 493; *Powell* v. *United States Cartridge Co.*, 339 U. S. 497, 517.

Defendant's contention that the statutory exemption for certain small newspapers without a similar exemption for small radio stations constitutes "an unwarranted, arbitrary and unreasonable discrimination" in violation of the Fifth Amendment is conclusively answered by the Supreme Court's decision in *Mabee* v. *White Plains Publishing Co.*, 327 U. S. 178. In that case, it was contended that the exemption for small newspapers, which at that time exempted only certain weeklies or semi-weeklies, unreasonably discriminated against small *dailies*. The Supreme Court disposed of this contention summarily as follows [327 U. S. at 184]: "The Fifth Amendment does not require full and uniform exercise of the commerce power. Congress may weigh relative needs and restrict the application of a legislative policy to

less than the entire field [citing *Steward Machine Co.* v. *Davis*, 301 U. S. 548; *Currin* v. *Wallace*, 306 U. S. 1, 13–14]."[3]

The decision in *Currin* v. *Wallace, supra,* which the Supreme Court considered to be the conclusive answer to the contention made in *Mabee* v. *White Plains, supra,* is equally applicable to the contention here made by Defendant. The Supreme Court there said [306 U. S. at 14]:

> There is no requirement of uniformity in connection with the commerce power (Art. I, Sec. 8, par. 3) such as there is with respect to the power to lay duties, imposts and excises (Art. I, Sec. 8, par. 1). * * * Undoubtedly, the exercise of the commerce power is subject to the Fifth Amendment * * * but that Amendment, unlike the Fourteenth, has no equal protection clause. * * * It is of the essence of the plenary power conferred that Congress may exercise its discretion in the use of the power. Congress may choose the commodities and places to which its regulation shall apply. Congress may consider and weigh relative situations and needs. Congress is not restricted by any technical requirement but may make limited applications and resort to tests so that it may have the benefit of experience in deciding upon the continu-

[3] It may be noted that this same contention was made before this Court in the case of *Walling* v. *News Printing Co.*, 148 F. 2d 57 (see decision of the district court, 49 F. Supp. 659, at 661, and briefs on appeal). Apparently this Court did not regard the contention as having sufficient substance to require consideration. The district court held the contention to be without merit for the same reasons stated in the Supreme Court's decision in *Mabee* v. *White Plains Publishing Co.*, *supra*.

ance or extension of a policy which under the Constitution it is free to adopt. As to such choices, the question is one of wisdom and not of power.

III. The overwhelming weight of the evidence establishes that defendant's employees worked substantial amounts of time for which they received no pay

The testimony of the employees Doelicke, Burton and Dolnack was uniformly to the effect that they had worked substantial periods outside the regularly scheduled time shown on their time sheets, and that they were not paid for this additional work.

Defendant argues that, in ruling from the bench at the close of the evidence that the weight of the evidence was against defendant, the trial court failed to evaluate the evidence properly. The short answer to this is that throughout the trial the court was aware, and expressly so advised defendant on repeated occasions, that in view of defendant's contention that the employees had not actually worked the hours they claimed to have worked, the case would necessarily be decided on the preponderance of the evidence (R. 31b, 32b). It is plain that the credibility of the various witnesses was in the forefront of the court's attention throughout the trial and that the court made its evaluation as the trial proceeded—a proper, and indeed the most accurate, method of performing this function of a trial court. In addition, the court accorded defendant an opportunity to present his own evaluation of the evidence at the conclusion of the trial, and treated defendant's

objection thoroughly in a thoughtful and well-considered opinion on defendant's motion for a new trial (R. 3–5a). In the face of these facts, defendant's contention that the trial court failed to "take time to evaluate the evidence" is entirely without substance.

Defendant also attacks the credibility of the testimony of the employees. The evaluation of the evidence from this standpoint is peculiarly a function of the trial court, whose findings will not be upset unless clearly erroneous. *Drexler* v. *Koza,* 156 F. 2d 370 (C. A. 3), certiorari denied, 329 U. S. 771, rehearing denied, 329 U. S. 831; *Smith* v. *McLane,* 174 F. 2d 819 (C. A. 3). Defendant places his major emphasis on an inconsistency in Burton's testimony, viz. that Burton testified he worked unrecorded and unpaid hours at night doing so-called "remote" and "request" shows, and that Burton's own time sheet recorded these hours as worked and that Burton himself admitted that he was paid properly for the hours shown on the time sheet (deft's. br., pp. 18–19). This inconsistency is a minor one and readily understandable when Burton's entire testimony is examined, a procedure not possible from the inadequate and misleading excerpts printed in defendant's appendix. Burton testified uniformly to the effect that he worked several hours a day driving Doelicke, the station manager, around town to sell advertising to the local merchants, and that he would accompany Doelicke in making such calls (R. 14b, 16b). Burton also testified that the time spent in this work was not shown on the time sheet and that he was not paid for it (R. 12a; R. 14b).

He stated that when he was initially hired he understood what his duties would be but did not "have an understanding at the time I was hired what my hours would be." He also testified that his regular workday was changed during March 1955 (R. 15b). In view of these circumstances, Burton's statement that the time spent on the "remote" and "request" shows was "in addition to his regular workday" simply indicated an uncertainty as to what was his regular workday at the particular time.

Indeed, for a part of the period involved, it would seem that defendant concedes that Burton was not paid for some of this evening work, since defendant did not carry his examination of this alleged inconsistency beyond February 19, although Burton testified that these shows ran until March (R. 13b). In any event, Burton's alleged "lie" in this respect is plainly a minor failure of recollection or an attempt to give an honest answer to questions phrased in such a manner as not to take into account the uncertainty of what Burton's "regular hours" were or the change in his schedule during the period involved. Burton's testimony was plain that he regularly assisted Doelicke in selling advertising and that in fact his workday regularly began at 9 o'clock or shortly thereafter, several hours before his time sheets indicated he was at work. It is also plain that he was not paid for some portion of his actual workday, regardless of what his "scheduled" hours may have been.

The other alleged inconsistencies likewise disappear when the entire testimony of the witnesses is examined, as distinguished from the inadequate and mis-

leading fragments printed in defendant's appendix. For example, defendant states that Doelicke testified he sold advertising in the afternoons five days a week and Burton testified that he did it in the mornings (br., p. 17). Yet Burton stated flatly that he drove and accompanied Doelicke on these missions in both "mornings and afternoons" (R. 14b) and Doelicke himself indicated that he sold advertising at both times. (R. 1b, 2b, 7b, 8b, 24b)* Defendant also objects generally that the failure of the employees to claim compensation for the extra time worked impairs the credibility of their testimony. It is plain that Doelicke made a repeated request for payment and that on one occasion defendant advised Doelicke that defendant's wife had thrown Doelicke's letter into the wastebasket. Likewise, it is plain that Burton complained to Doelicke, the station manager, that he should be paid for the work he was performing (R. 14b); and since Doelicke was managing the station for defendant, Burton's action is the normal and perhaps the only proper one for him to have taken.

Defendant makes no attempt to impeach the testimony of Lesco and Dolnack, who also stated that they had worked substantial time for which they were not paid. Defendant simply urges that this evidence should not be considered because plaintiff failed to list these witnesses among those whom, prior to the trial, he advised defendant were the witnesses who

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*Doelicke was never asked directly whether he sold advertising in the morning. These excerpts show he sold when he wasn't broadcasting, and that he broadcast regularly in the afternoons during one period.

would be called. These witnesses were employed at the same radio station as Burton and Doelicke, and in view of the allegations of the complaint that the violations related to "employees in and about" the radio station, their testimony can have come as no surprise to defendant. Nothing in Rule 26, FRCP, requires that the adverse party be given an exhaustive list of witnesses, or that a party "limit itself in the introduction of testimony to certain named witnesses," *Coca-Cola Co.* v. *Dixie-Cola Laboratories*, 30 F. Supp. 275 (D. Md.), affirmed on other grounds, 117 F. 2d 352 (C. A. 4), certiorari denied, 314 U. S. 629; *Aktiebolaget Vargos* v. *Clark*, 8 F. R. D. 635 (D. C. D. C.). If material witnesses are expected to be unavailable because not readily amenable to the process of the court in which the trial was held, and then unexpectedly return to the district, as was the case with Dolnack, there is nothing to inhibit the trial court's consideration of his testimony.

Evidently recognizing that he could not effectively refute the evidence that the employees worked many hours for which he did not pay them, defendant falls back on the contention that he was unaware these hours were being worked, did not authorize them, and was entitled to rely on the time sheets prepared by the employees themselves. The trial court simply did not believe defendant was unaware this work was being performed, and it is difficult to see how it could have concluded otherwise. Defendant himself testified that prior to the time the station went on the air, he visited the locality frequently and devoted substantial time to promoting and selling advertising for the

station (R. 28b, 29b). When the station was about to go on the air, he sent Mrs. McLaughlin and Mrs. Lesco into the area for several days for an extensive selling program. Defendant also testified that the entire income of the station was derived from advertising and that it was necessary to sell advertising to keep the station operating (R. 31b). Doelicke, the manager, testified that defendant asked him to get the other employees also to sell advertising, and promised them the same 15% commission he had promised Doelicke (R. 1b, 5b). Defendant also testified that he visisted the station occasionally after it went on the air but that his visits gradually dropped off and after a few months he rarely visited the station, and all of these visits were for very brief periods, on some occasions only a few minutes.

The mere recital of these facts is enough to show that defendant was aware advertising had to be sold, that the station employees were the only ones to do it, and that they were necessarily devoting a substantial amount of time to such work. Since the regular posted work schedules of the employees related only to the time to be spent at the station in order to conduct its operation, it is likewise evident that defendant knew that no compensation was being paid for this unscheduled work. In such a situation, defendant's contention that he had a right, under the statute, to rely on the time sheets furnished by the employees has a peculiarly hollow ring. Such "reliance" by defendant was aptly characterized by the trial court as either gross carelessness or as "very cutely [keeping] it outside of his record" (R. 34b). It is

well-settled that such conduct by any employer does not relieve him from his obligation to meet the statutory requirements, or mitigate his failure to do so. *Hertz Drivurself Stations* v. *United States*, 150 F. 2d 923 (C. A. 8); *Mitchell* v. *Raines*, 238 F. 2d 186 (C. A. 5); *Walling* v. *Panther Creek Mines*, 148 F. 2d 604 (C. A. 7).

IV. The action is not moot and the grant of injunctive relief was plainly a valid exercise of the trial court's discretion

Defendant argues that because it has closed the particular station where the conduct which gave rise to this litigation occurred, this action is moot and the grant of an injunction was improper. Defendant cites no authorities for its claim of mootness, and the very fact that defendant is vigorously pressing this appeal on the substantive issues involved would seem sufficient to refute its claim of mootness. It is too well-settled to admit of contest, at this late date, that the cessation of the operations or of the conduct which gave rise to an enforcement action under a Federal regulatory statute does not render the case moot. *Carpenters Union* v. *Labor Board*, 341 U. S. 707; *Mitchell* v. *Vollmer & Co.*, 349 U. S. 427; *Walling* v. *Haile Gold Mines*, 136 F. 2d 102 (C. A. 4); *Tobin* v. *Ramey*, 205 F. 2d 606 (C. A. 5), rehearing denied, 206 F. 2d 505, certiorari denied, 346 U. S. 925; *Walling* v. *James V. Reuter, Inc.*, 321 U. S. 671; *Mitchell* v. *Joyce Agency, Inc.*, 348 U. S. 945. See also *Walling* v. *Helmerich & Payne*, 323 U. S. 37; *United States* v. *Trans-Missouri Freight Assn.*, 166 U. S. 290; *Southern Pac. Terminal Co.* v. *Interstate Commerce Comm.*, 219 U. S. 498; *Federal Trade Commission* v. *Good-*

year Co., 304 U. S. 257; *National Labor Relations Board* v. *Pennsylvania Greyhound Lines*, 303 U. S. 261.

Specifically, in actions to enforce the Fair Labor Standards Act, the Supreme Court has repeatedly rejected claims of mootness based upon cessation of the operations involved in the particular litigation or discontinuance of violations (see *Vollmer, Reuter, Joyce Agency* and *Helmerich & Payne* decisions, *supra*). Thus, neither completion of the construction project involved in the *Vollmer* case, nor the dissolution of the corporate employers in the *Reuter* and *Joyce Agency* cases rendered those actions moot.[1]

As the Supreme Court has pointed out in other leading decisions on the mootness issue, "the most important object" of litigation "by the Government as a substantial trustee for the public under the act of Congress" is not merely to terminate past and current conduct but "that the defendant should be enjoined for the future" (*Trans-Missouri* decision, *supra*, 166 U. S. at 308, 309) and that there be a final settlement

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[1] Although the opinions in the *Vollmer* and *Joyce Agency* cases do not explicitly reflect the ruling on mootness, in both cases the issue was raised and fully briefed by both parties—in *Vollmer*, at the invitation of the Court, and in *Joyce* upon respondent's motion to dismiss for mootness. Since the Supreme Court then, in both cases, proceeded to a decision on the merits, *reversing* the judgment of the courts below which had denied relief, its decisions were, in effect, rulings that the cases were not moot. In *Joyce*, the judgment of the district court granting an injunction was reinstated, and in *Vollmer*, after remand to the District Court, an injunction was issued (Civil Action No. 3280, E. D. La., New Orleans Div., dated August 12, 1955).

of any dispute over the legality of challenged practices which are "capable of repetition" (*Southern Pac. Terminal* decision, *supra,* 219 U. S. at 515; see also *United States* v. *W. T. Grant Co.,* 345 U. S. 629 at 632–633).

In effect, defendant is asking that he be permitted to frustrate the enforcement of the Act merely because he has voluntarily discontinued violations, which he would then remain free to resume at will either at the same location or elsewhere. See *Walling* v. *Helmerich & Payne, supra,* specifically holding that "[v]oluntary discontinuance of an alleged illegal activity" prior to trial does not render moot an enforcement action under this Act (323 U. S. at 43). As the Court pointed out in the *Carpenters Union* case, *supra,* (in holding that the enforcement action by the Labor Board had "not been rendered moot by the completion of the * * * project") the challenged practices may be "merely a sample of what might be repeated elsewhere if not prohibited" (341 U. S. at 715). See also the *Pennsylvania Greyhound* decision holding that an action to enforce a Board order "does not become moot because it [the order] is obeyed or because changing circumstances indicate that the need for it may be less than when made" (303 U. S. at 271). To hold that an enforcement action can become moot merely by voluntary changes in the conduct of defendant's business, as the Court pointed out in the *W. T. Grant* case, *supra,* would "mean that the defendant was entitled to a dismissal as a matter of right * * *. The courts have rightfully refused to

grant defendants such a powerful weapon against public law enforcement" (345 U. S. at 632).

In the *Haile Gold Mines* case, *supra*, which, like the instant case, was an action under the Fair Labor Standards Act, and closely paralleled the facts of the instant case in that the employer had ceased operations and dismantled its equipment, the Fourth Circuit, on the authority of the above cited Supreme Court decisions, held that it was settled that such cessation of operations did not render the case moot.

> It is familiar law that the discontinuation of an illegal practice by a defendant (either by going out of business or otherwise) after the institution of legal proceedings against the defendant by a public agency, does not render the controversy moot [citing the *Trans-Missouri, Pennsylvania Greyhound,* and *Goodyear* decisions, *supra*]. * * * This particularly is true where the challenged practices are capable of repetition. See *Southern Pac. Terminal Co.* v. *Interstate Commerce Commission,* 219 U. S. 498.

If, as seems clear from the above decisions, the case is not moot, defendant's argument boils down to a contention that the court, in the exercise of its sound *discretion,* was not warranted in granting injunctive relief. This contention, also, is manifestly untenable. It is significant that the only authorities cited by defendant is urging *reversal* of the grant of an injunction are cases in which the trial court exercised its discretion to *deny* injunctive relief and was *affirmed* by a court of appeals (see Defendant's brief, pp. 31–32). As this Court has stated, and as even defendant ap-

parently concedes (see deft's. br., p. 31), "It is settled, however, that the question whether an injunction shall be issued under such circumstances is to be determined by the district court in the exercise of its discretion [citing *Hecht Co.* v. *Bowles*, 321 U. S. 321]", and, therefore, unless the trial court has plainly "abused its discretion," its grant of such relief will be affirmed. *United States* v. *Walter Gerbron, Inc.*, 194 F. 2d 708, 709 (C. A. 3).

There was plainly no such abuse of discretion by the court below in the instant case. On the contrary, the grant of an injunction, in the circumstances of this case, was undeniably a sound and valid exercise of discretion under the standards prescribed by the Supreme Court in *Hecht Co.* v. *Bowles, supra.* The Court there took pains to make clear that, although the statutory injunction remedy like the traditional equity injunction is "designed to deter, not to punish," this does "not mean to imply that courts should administer [the statutory injunction provision] grudgingly" (321 U. S. at 329, 330). The courts' "discretion * * * must be exercised in the light of the large objectives of the Act. For the standards of the public interest, not the requirements of private litigation, measure the propriety and need for injunctive relief in these cases" (*id.* at 331).

The particular circumstances of this case more than amply support the conclusion of the court below that there is need for an injunction. Defendant admittedly is still in the radio broadcasting business and retains an interest in other broadcasting enterprises, and still retains a serviceable building con-

taining usable transmission equipment at the site of the station here involved. He is also vigorously pursuing this litigation and still vehemently contesting the applicability of the Act. In these circumstances, the case is almost exactly parallel to *Haile Gold Mines, supra,* which, like defendant, had also closed down its operations, "dismantled its mines and removed its machinery," and surrendered its federal license from the United States Mint. (136 F. 2d at 105.) The only conceivable difference between *Haile* and the present case is that *Haile* ceased operations at the request of the War Production Board, whereas defendant here did so voluntarily, and *Haile,* in surrendering his license indicated he would doubtless wish to apply for a new license to resume gold mining at some indefinite future date after the war when the Government ban on gold mining was lifted. In this respect, defendant's circumstances point to an even greater opportunity for violation because defendant is under no such order to cease operations indefinitely and, indeed, has substantial interests in *presently-operating* broadcasting facilities of the same type as the station involved in this suit. In *Haile,* the Fourth Circuit reversed the trial court's *denial* of relief, and ruled that the injunction should have been granted because "the possibility of future violation of the Act by Haile is very much with us and not merely within the realm of prophecy" (136 F. 2d at 105).

This Court, in *Woods v. Wolfe,* 182 F. 2d 516, reached the same conclusion in analogous circumstances. There it was argued an injunction against

rent control violation should not issue because defendants had ceased "acting as landlords" prior to the trial, the occupancy of the premises having been taken over by their son. This Court, affirming the district court's grant of an injunction, said:

> On the merits we agree with the conclusion of the court below that because the defendants are presently in a position, perhaps temporarily, where they could not violate the law, it does not mean that they might not be quick to violate it again. A four-year long period of prior deliberate misconduct requires a strong showing that the offending individuals are actually in *locus penitentiae*. The Wolfes have made no such showing. Under the circumstances we cannot say that the court below abused its discretion in issuing the injunction (182 F. 2d at 518).

Similarly, in *National Labor Relations Board* v. *Westinghouse Air Brake Co.*, 120 F. 2d 1004 (C. A. 3), this Court held that even a present *willingness* to comply with the Board's order does not warrant the denial of court enforcement, for "the question is not what the respondent's attitude may now appear to be, but what it was down through the hearing before the Board * * *. Any other course would make a proceeding before the Board interminable for which an adjudicated offender's later repentence can furnish no excuse" (120 F. 2d at 1007). In *Chambers Construction Co.* v. *Mitchell*, 233 F. 2d 717, 725 (C. A. 8), the employers' attitude that they "need not change and that the Act does not and never did apply" and their "insist[ence] that they are not here

as sinners doing penance but as among the just who do not need penance" was held to warrant issuance of the injunction.

Defendant here, far from showing that he is "actually in *locus penitentiae,*" is still vigorously asserting his right to continue his operations as before. Indeed, his cessation of the violation was not due to willingness to comply, or to either voluntary or involuntary *compliance* with the Act, but occurred solely because the radio station became unprofitable. Defendant's assertion that the violation ceased following investigation made by the Department of Labor is demonstrably inaccurate, for the employee Agnello testified flatly that he had not been paid for work he performed in February 1956 (R–19b)—contrary to defendant's misleading statement that "his testimony is unclear" with respect to this continued violation (brief, p. 17).

The considered conclusion of the trial court, upon which it determined that discretion required the issuance of the injunction, was that defendant had either failed to devote the proper attention to the operation of the station or "very sagaciously, we will say, saw there was not any record there that would incriminate him in any way" (R–34b). This Court, in *Bowles* v. *Leithold,* 155 F. 2d 124, certiorari denied *sub nom. Leithold* v. *Porter,* 327 U. S. 794, has had occasion to consider such conduct, and has held the issuance of an injunction to be proper under the Emergency Price Control Act, where the defendant failed to furnish the required information concerning his prices in the base period. The fact that the information was

furnished after the suit was begun, but prior to the hearing, was held to be no basis for reversing the issuance of the injunction, for the reason that

> A defendant who has thus made it practically impossible for anyone to tell whether he is violating price ceilings or not, by withholding the fundamental information, is not unlikely to violate those ceilings under cover of the darkness which his failure to give information has created. At least it is not unreasonable for one to conclude that such a happening is within the range of probability and to guard against it by injunction (155 F. 2d at 127).

In *Leithold*, no violations of the substantive requirements of the Price Control Act were proved or even alleged, while in contrast, defendant has been shown to have committed numerous substantive violations over a longer period, so that the injunction is even more appropriate in this case. When it is remembered that at the time these violations occurred, an injunction was outstanding against a corporation of which defendant was an officer for violation of the same statute here involved, the need for the injunction becomes even more obvious.

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted.

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APPENDIX I

Statutory Provisions Involved

The pertinent statutory provisions of the Fair Labor Standards Act of 1938, as amended by the Fair Labor Standards Amendments of 1949 (c. 676, 52 Stat. 1060; c. 736, 63 Stat. 910, 29 U. S. C. 201 *et seq.*) are:

> Sec. 3. (b) "Commerce" means trade, commerce, transportation, transmission, or communication among the several States or between any State and any place outside thereof.
>
> * * * * *
>
> Sec. 16. (c) Any order, regulation, or interpretation of the Administrator of the Wage and Hour Division or of the Secretary of Labor, and any agreement entered into by the Administrator or the Secretary in effect under the provisions of the Fair Labor Standards Act of 1938, as amended, on the effective date of this Act, shall remain in effect as an order, regulation, interpretation, or agreement of the Administrator or the Secretary, as the case may be, pursuant to this Act, except to the extent that any such order, regulation, interpretation, or agreement may be inconsistent with the provisions of this Act, or may from time to time be amended, modified, or rescinded by the Administrator or the Secretary, as the case may be, in accordance with the provisions of this Act.

APPENDIX II

[15] Q. What were the terms of compensation on a weekly or semi-monthly basis that were agreed upon between Mr. Rennekamp and yourself?

A. Well, the agreement was $65 per week for 48 hours.

Q. For 48 hours?

A. Yes.

Q. Was that broken down into an hourly rate?

A. Yes, it was.

Q. What was the hourly rate?

A. A dollar and a quarter an hour for 40 hours, and it was a dollar eighty-seven for time and a half for the 8 hours—I think it came to that figure—in other words, a total of $65.

Q. Sixty-five dollars per week?

A. That's right.

* * * * *

[19] Mr. WEINER. I shall ask the witness to answer.

A. Well, there were several occasions where Mr. Rennekamp and I had a talk and he suggested I put some pressure—several times—on selling, and I would get 15 percent commission. I mean, that item, that item was brought out to me several times, and it was also said to me the other employees should sell, too—they'll receive their 15 percent, but they never did sell any.

Q. Did you actually put in any time selling?

A. Oh, I had to. It's the only way I could—

Q. How many hours a day would you put in?

A. Well, I never kept track of how many hours.

Q. To your best recollection?

A. I would spend a whole afternoon downtown.

Q. How many hours would that come to?

A. I would say three, four hours.

Q. How many days a week would you put into your selling effort?

A. The business days, five days.

Q. Five days a week?

A. Yes.

Q. Would the time that you spent in your selling activities be included in the time reports that you sent in to Mr. Rennekamp?

A. No, sir.

[20] Q. Why not?

A. Well, for the, for the simple reason Mr. Rennekamp mentioned to me 48 hours on that—would be the working time on that sheet.

* * * * *

[21] Q. Did you announce at the station as part of your duties? I think you so testified.

A. (Witness nods.)

Q. Did you announce news reports?

A. Yes. We had our regular news casts.

Q. Where did those news casts originate?

Mr. LEVIN. If you know.

Q. If you know. Let me ask you a more direct question: Did you have an A. P. wireservice at the station?

A. Yes—Associated Press.

Q. Did the A. P. wire service come over the ticker?

A. Yes, we had the ticker there.

Q. Where was the ticker located?

A. Right in the confines of the station shack itself.

Q. How frequently did you broadcast the A. P. wire service reports?

[22] A. Well, I know, we had three 15-minute newscasts and——

Q. Three fifteen——

A. Fifteen-minute newscasts.

Q. Was that daily?

A. Pretty near, with the exception of Sunday because Sunday was a little different time schedule, but Monday through Saturday it was.

Q. Three 15-minute newscasts?

A. Yes.

Q. Using the A. P. wire service?

A. That's right.

Q. Did any of the other employees announce newscasts?

A. Oh, yes.

Q. Who were some of the other employees, if you recall?

A. Well, there was a lad by the name of Dolnack and another boy by the name of Burton. There were several others but I don't recall their names.

Q. Did the station ever broadcast any out-of-town baseball or football games?

A. Well, the first season we broadcast the—through a pickup—the Pittsburgh Pirate baseball games and also the Pittsburgh Steelers football games.

Q. Would these games be played within Pennsylvania or outside of the State?

A. The football games came from outside the State and [23] there were several foot—baseball games. I imagine when the season got on toward the end and the games became very important with the top contenders they were broadcast from other parts, too. There weren't many of those but they evidently pleased the fans that way.

Q. Did you broadcast weather reports?

A. Yes.

Q. Where did those weather reports originate?

A. We took ours from the Associated Press machine.

Q. Were those weather reports a daily occurrence?

A. Yes.

Q. And you would announce them daily?

A. Yes.

* * * * * * *

[25] Q. Did you ever receive any commission on your selling activities?

A. No, sir.

Q. Did you make reports to Mr. Rennekamp concerning your selling activities?

The WITNESS. What do you mean by "reports," sir?

Q. Well, did you communicate to Mr. Rennekamp stating whom you contacted, what sales you were able to make and what [26] sales you were not able to make?

A. Well, in the beginning I did because he had asked to send us—to send him a weekly—rather, a monthly estimate on accounts and accounts that had paid, and that I did in the first few months.

Q. And then what happened?

A. The reason I was happy to do this, not only because he asked——

Mr. LEVIN. That's objected to as not responsive to the question.

Q. Well, you did this for the first few months?

A. Yes, sir.

Q. And then you ceased doing it?

A. Yes.

Q. My question is: Why did you cease doing it, Mr. Doelicke, was there any reason specifically?

A. Because I was hearing no response from him and it did not seem to rectify the bad situation we had of getting more money in the bank. The reason for sending

this was to—in other words, to show Mr. Rennekamp how much deposit was in the bank that we could draw our checks on.

• • • • •

[52] Q. We're talking now about a few days later. You say there was another discussion with Mr. Rennekamp a few days later?

A. Then and several times he mentioned about the selling.

Q. Will you give us the substance of those conversations as well as you recall them either that second time or any subsequent times?

A. Well, it was words to the effect that I should sell and I would get 15 percent commission for selling—any time I would sell I would get the 15 percent.

Q. Was there anything said about how that 15 percent would be arrived at? Was that 15 percent on the billing?

A. No. That was 15 percent on each sale.

Q. The amount of the sale?

A. Yes. The billing is the same thing—the billing, the billing is something else again.

Q. Were you asked by Mr. Rennekamp to put in any extra hours making sales?

A. No. He just said go out and sell.

Q. He didn't specify when you were to go out and sell?

A. No.

Q. How many times did you talk to Mr. Rennekamp during that particular week that you say he came up? You've mentioned [53] two times. Were there any further questions with Mr. Rennekamp around that time?

A. Well, in his other visits mention was made about, "Let's put a little pressure on the selling and ask the

other boys if they want to sell, too. They'll get 15 percent."

Q. On those other occasions was anything said as to what hours you were to put in selling?

A. There was no mention made of hours.

Q. At any time?

A. No.

Q. Between the time in April of '54 that you went to WEMR and the time you left how many times would you say that Mr. Rennekamp had been up to the station in person?

A. Actual count I couldn't give you.

Q. Well, could you give us a rough idea?

A. No, I couldn't.

Q. As a matter of fact, he came there very infrequently, isn't that true after you first got there?

A. Well, as I stated previous, the first six months he came up, in the first part of the six months, he came up frequently, then it gradually dwindled off into nothing.

Q. So, after the first six months he would come up there at long intervals, isn't that right, or hardly at all?

A. Yes.

* * * * *

[65] Q. And does that show an operation of 12 noon to 7 p. m.?

A. That's right.

Q. And does that indicate that that's the period of time the station was on the air on those two days?

A. No. This is my time record, the time I worked.

Q. Would there have been anyone else there other than you in addition to those seven hours?

A. Yes, it's possible.

Q. Do you know?

A. Well, I don't know. I haven't got these records on my fingertips. This is something that happened over a year and a half ago.

Q. Didn't you usually work Sundays at the station while it was in operation?

A. Not all the time, no.

Mr. WEINER. May I see that time record, please?

(Document handed to Mr. Weiner.)

Q. Now, you say that you don't have these matters at your fingertips, is that right?

A. No, sir.

Q. But you still want to say that you worked 60 hours a week throughout the entire period in view of the fact that you do not have these records at your fingertips?

[66] A. Had I known I was supposed to keep them I would have kept them and I would have had them here.

Q. Would your records not have been a duplicate of what I just showed you?

A. They most certainly would have not.

* * * * * *

[71] Q. Did you work 60 hours every week that you were there?

A. Yes, yes.

Q. Right on the nose?

A. That's right.

Q. Did you time yourself?

The WITNESS. You mean right on the nose, 60 hours?

Q. Yes.

A. No. I would say that was, was the least that I worked, 60 hours.

Q. What was the most you worked?

A. Oh, gosh, it depends how long I spent with clients, and how long I had to do billing and everything like that. There were some nights that I did billing I stayed up long after we went off the air.

Q. Well, when you testified that you worked 60 hours on direct examination how did you arrive at that figure?

A. Well, I was on the air from six at night to 11:15.

Q. Now, just a minute, when you say you were on the air——

Mr. WEINER. Let him answer the questions. He's trying to give you some specific hours. I think you ought to let him answer the question without cutting in.

[72] Mr. LEVIN. Go ahead.

Mr. WEINER. Go ahead.

A. (Continued.) Well, that six, you've got to figure 5:45, because six o'clock was the news, to 11:15 sign-off. There was an hour for lunch, from 12 to 1; there was an hour in the morning when I would give one of the boys a break, and we also did a breakfast show.

Mr. WEINER. When did that start?

The WITNESS. I think it was nine o'clock or nine to ten, or second cup of coffee thing, something like that.

Mr. WEINER. Nine a. m. you started. Go ahead.

The WITNESS. It was more or less to give him a break, too.

Mr. WEINER. From nine till when?

The WITNESS. Till ten.

A. (Continued.) Now, the afternoon, of course, as soon as I finished that hour I would sit down and start going through the station business and letters and any correspondence and stuff like that and I'd usually be up there right through until one o'clock.

Now, these times that I did the billing and everything, that was never considered in the working time either. There was no mention made of that, who would do it, so I took it upon myself to do it. In

the afternoon I would spend at least three or four hours downtown with clients.

* * * * *

[93] Q. Do you recall getting paid some extra money?

A. It's vaguely in my mind, yes. It wasn't much, but I remember one instance way in the beginning when I did get something.

Q. Could your testimony about the 60 hours that you worked, plus, be vaguely in your mind, too, during this period?

A. No.

Q. That's not vague?

A. No, because I lost 36 pounds. That's—there's no vagueness about those hours.

* * * * *

[103] Q. Now, since you were working at this station from, you say, April of 1954, do we understand that you presented these time sheets showing the hours that you worked in the operation of the station and received payment from time to time and continued to work without making an issue of money that you now claim was due you for selling advertising? Is that a fact?

A. I made an issue of it many a times, many a times I called up Pittsburgh, but I got the standard answer that Mr. Rennekamp was on the road or some place like that.

[104] Q. But you only wrote him one letter about it and that was five weeks before the termination of your service, isn't that right?

A. One letter that I kept, yes—I mean, in other words, a copy that I made of it.

* * * * *

Q. Mr. Doelicke, tell us under what circumstances you left the employ or discontinued your employment with Station WEMR?

A. Well, the, the night before the station was put off the air I called up Mr. Rennekamp, and this is the whole story here on this particular instance, and I got Mr. Rennekamp on the phone this time for the simple reason that he answered first, and I told him who I was and that we needed another engineer because Burton was leaving, and that was all right, he was going to see what we can do.

[105] Then I asked if he had received my letter. He says, "What letter is that?" I says, "Well, the one I sent to you about five weeks ago," and he says, "Oh, that. My wife read it and threw it in the wastebasket," so then he hung up. I was holding the receiver. So the next thing I knew, the next day—oh, I called back again, I believe, and got his wife and said that—"Better get somebody to replace me."

The next day Dolnack answered the phone at the station and it was Mr. Rennekamp and Mr. Dolnack had received—George Dolnack had received word from Mr. Rennekamp to put the station off the air, so George said, "Well, I'm only the announcer here. Tell that to Bob," so I answered the phone and Mr. Rennekamp said, "I want that station put off the air right now. That's an order," so that was it.

* * * * *

[115] Q. Do these hours shown here include those hours spent trying to sell?

A. No, they don't.

Q. I show you Defendant's Exhibit B, consisting of 19 pages of Time Records. Do these records reflect all the hours of work actually spent in the pay periods designated in this first pay period from September 15, 1954, through September 28, 1954?

Mr. LEVIN. Just a moment. That is objected to for the same reasons given in connection with Exhibit A, and all questions pertaining to Exhibit B will be objected to for the same reasons, and for the further reason that at this late date they constitute self-serving declarations on the part of the witness.

Mr. WEINER. Now, Mr. Doelicke, answer the question.

A. No, they don't show the full time that I put in there. They show the 48 hours which, which were required of [116] us to be put on the time sheet.

Q. When this schedule of hours was drawn up, Mr. Doelicke, was it drawn up for any particular purpose?

Mr. LEVIN. That's objected to as leading and improper, irrelevant, incompetent and immaterial.

The WITNESS. May I have that question once more?

Q. Was there any particular purpose for drawing it up this way?

A. Yes. The purpose was to even out the 48 hours per week which I was supposed to have on my time sheet.

Q. Now, did you have any conversation with Mr. Rennekamp with respect to how these should be shown, what hours they should show?

A. As to specifications as to air time, no, but as to specification of 48 hours and no more, that Mr. Rennekamp made pretty clear with all of us.

* * * * *

[119] Q. Now, did you send in one of these sheets in the early part of your employment with hours showing in excess of 48 in a work week?

A. Yes. This was before I actually knew about the 48-hour limit.

Q. And what happened?

A. Well, it was sent back to us and to make out a new time sheet and that I did, conforming with 48 hours.

Q. Then what happened?

A. Well, I got my check.

[120] Q. And did you conform with the 48-hour schedule thereafter?

A. For the rest of the period that I worked there, yes, sir.

Q. In each of the periods of work shown in Defendant's Exhibit B did you work selling or attempting to sell time on Radio Station WEMR?

* * * * *

A. This time sheet was made an announcer-manager and all selling time was not put on this sheet at all, on any sheet.

Q. The time shown on all of the sheets included in Defendant's Exhibit B was only for the time spent by you as an announcer-manager, is that correct?

* * * * — *

[121] A. Yes, sir.

* * * * *

[13] ALBERT P. BURTON, a witness in behalf of the Government, having been duly sworn, testified as follows:

Direct examination by Mr. WEINER.

* * * * *

[21] Q. And when did those request shows start in relation to your commencement of employment with the defendant company?

A. I don't recall the exact date but I would say——

Q. As best you can recall.

A. I would say perhaps six weeks.

Q. Six weeks?

A. After I began working at WEMR.

[22] Q. That would bring it sometime——
A. In December.
Q. In December of 1954?
A. Yes.
Q. How long did these request shows run?
A. Over a period of months?
Q. Yes, or whatever the period of time was?
A. Three months, four months perhaps.

* * * * *

[25] Cross examination by Mr. LEVIN:

* * * * *

[26] Q. * * * And at any given time, was it necessary to have more than one person on duty?
[27] A. Yes.
Q. To keep the station on the air?
A. Yes.
Q. Who would that be or why or where?
A. Well, the reason would be—one reason would be the request show which ran from nine o'clock until eleven o'clock in the evenings, because one person was required to answer the telephone and the other person was required to play the records and announce between the records.
Q. Well, as I understand you, you said that those request shows ran for a period of a couple of months or something of that sort?
A. About three months.
Q. About three months?
A. Possibly four.
Q. As a matter of fact, they started in December of 1954, isn't that right?
A. As I recall, yes.
Q. Aside from these request shows you talked about, I mean during the normal routine operation of the station, wasn't it a one-man operation?

A. Well, I believe the request show was routine. It is in most stations.

* * * * *

[39] Q. When would you do your driving, in the afternoons?

A. Mornings and afternoons.

* * * * *

[40] Q. Let me ask you this: Did you ever for any occasion you drove and it was not within your scheduled hours, did you ever demand payment?

A. No. Oh, I did, yes.

Q. From whom?

A. Mr. Doelnicks.

* * * * *

[43] Redirect examination by Mr. WEINER:

* * * * *

[44] Q. My question is, what time did you arrive at the station?

A. At the station shortly after nine o'clock, usually.

Q. The record here shows you arrived at twelve noon?

A. That's right.

Q. My question to you is, what is the actual time that you reported at the station? Was it nine o'clock or was it twelve noon as shown on this time record?

A. Nine o'clock.

Q. Nine o'clock?

A. That's right.

Q. I show you the record for the workweek ending 1–17–55 and ask you whether this record which shows twelve noon as reporting time or whether nine a. m. was the actual reporting time?

A. Nine a. m., or shortly after nine a. m.

Q. I show you the record for February 1st, 1955, and ask you the same question, which is the correct time, twelve noon or nine a. m. for reporting?

A. Nine a. m.

Q. That is true consistently through March 1st, 1955, March 29th, 1955. March 29th, 1955, shows you reporting at seven-thirty a. m.?

[45] A. Yes. The hours were changed about this time and I began to work a shift on the board, that is as announcer, just about that time. So the hours reported there should be correct as far as my time actually at the station on the air.

Q. Reporting at the station?

A. Yes.

Q. At 7:30 a. m.?

A. Yes.

The COURT. That's commencing when?

Mr. WEINER. 7:30 a. m.

The COURT. What date?

Mr. WEINER. March 29, 1955.

Q. Prior to March 29, 1955, what was the time you actually reported at the station for work?

A. Nine o'clock.

Q. That's all.

Recross examination by Mr. LEVIN:

Q. Mr. Burton, are you saying that although you show on here that you reported at certain times that you came in at nine o'clock, earlier than you show on here?

A. Yes.

* * * * *

[46] Q. Was that voluntary on your part or were you required to do it?

A. I was required to do it.

Q. By whom, Mr. Doelicke?

A. By Doelicke.

Q. All you would do then was simply wait until he discusses his business and come back, is that it?

A. That's right.

Q. Then you'd chauffeur him to the next customer in Emporium?

A. That's right.

Q. How long would that take, that whole performance?

A. Well, no definite time, as long as he was making calls.

Q. What were those dates that you have testified to here? Were you referring to this period in February that you show twelve noon and 11:45 reporting?

A. Yes, you see we did this, we worked on this basis up until [47] the time shown I believe it was in March when I alternated one week I would open the station and work through into the afternoon and then the next week I would come in in the afternoon and work through until 11:15.

Q. On these particular days, I am looking at December 17th to December 30th, when you show twelve noon and 11:45 as your time——

A. Yes.

Q. Do you mean you came in at nine o'clock at that point?

A. Yes, sir.

Q. Then you went out again with Doelicke?

A. Yes.

* * * * *

[49] GEORGE E. DOLNACK, JR., a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. WEINER:

* * * * *

[50] Q. Did you announce newscasts?

A. Yes, I did.

[51] Q. Did you take news off the ticker?

A. Yes, I took it off the ticker, edited it and broadcast it.

Q. Edited the news?

A. That's right.

Q. How many times did you broadcast?

A. At the most three and four times a day.

Q. For what period of time?

A. I imagine after I had been there between four and six weeks, then I started to broadcast between three and four times a day.

Q. Between three and four times a day?

A. That's correct.

Q. How long would these newscasts last?

A. These newscasts lasted five minutes and in some cases, a 15 minute newscast.

* * * * *

[54] Q. Do you recall whether or not the hours you worked on remotes and so on, this request show was indicated on your schedule of hours worked?

A. No, they weren't indicated on my schedule of hours worked. I mentioned that to Mr. Doelicke that I'd like to receive compensation for the extra time I put in. His reply was there would be no use because Mr. Rennekamp would not pay me overtime for those hours but that was during the period up until May 31st but the second period between—oh June, sometime in June to July 31st, I did work overtime with James Starrett who was chief engineer, and turned more than 48 hours in for that and I was compensated for that.

By Mr. LEVIN:

Q. You say you were compensated?

The COURT. Don't break in just because he said that. Let him tell his story. You heard that.

Mr. LEVIN. I am not sure.

The COURT. I think you heard that.

A. Subsequently to that time, I didn't turn in my time other than the 48 hours because Mr. Doelicke stated there would be no use and I wouldn't receive compensation for it.

* * * * *

[60] A. It shows on the time record I worked those hours but actually I didn't work those hours. I was told by Mr. Doelicke to put this record of time on the time sheet in order to show Mr. Rennekamp that none of the employees' time at the radio station would overlap and maybe Mr. Rennekamp would question the reason why two or more men would be on duty at the radio station during that time.

Q. So Mr. Doelicke then instructed you to make out the record this way, so Mr. Rennekamp wouldn't know there was overlapping going on, is that correct?

A. That's correct.

Q. You never told Mr. Rennekamp there was overlapping time, did you?

A. Well, there had to be overlapping time in order that the [61] station perform as it did.

* * * * *

[75] JAMES D. AGNELLO, a witness in behalf of the Government, having been duly sworn, testified as follows:

* * * * *

By the COURT:

[91] Do the time sheets you have just been shown by Mr. Levin correctly reflect the hours you worked between August 1955 and February 1956?

Mr. LEVIN. Do you want to look at these?

The COURT. I am asking a question. Read the question to him.

(Question read.)

A. No.

Q. What is your explanation why the time sheets do not reflect the hours?

A. I sold time.

Q. Well, over and above the time shown on the sheet, is that it?

A. That's right.

* * * * *

[66] CHARLES A. WELSH, Jr., a witness in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination by Mr. WEINER:

Q. What is your name?

A. Charles A. Welsh, Jr.

Q. Where do you live?

A. 5207 Lawson Road, Baldwin Borough, Pittsburgh 36.

Q. By whom are you employed?

A. The Associated Press.

Q. How long have you been employed there?

A. Since July 1st, 1942.

Q. What is your present position?

A. Correspondent in charge of the Pittsburgh Bureau of the Associated Press.

Q. How long have you held that position?

A. Since August of 1955.

Q. Could you tell us what kind of an organization the Associated Press is?

A. The Associated Press is a non-profit cooperative news gathering organization gathering news throughout the world for distribution to newspapers and radio stations, principally [67] in the United States and other countries.

Q. Are there associate memberships in the Associated Press?

A. Yes, we have a category which we list as associate membership. I am unable to give you the technical differentiation between associate and regular member.

Q. How does the Associated Press gather its news?

A. The Associated Press gathers its news primarily through the efforts of the newspapers and radio stations which are members of the A. P. and the efforts of Associated Press news staffers wherever they may be employed.

Q. How does it distribute or transmit its news to its members?

A. Principally and almost completely by teletype messages over leased wires. Stories that are written by newsmen for distribution to newspapers and/or to radio stations.

[140] KENNETH E. RENNEKAMP, a witness in behalf of the defendant, having been duly sworn, testified as follows:

Direct examination by Mr. LEVIN:

* * * * *

[141] Q. Is your law practice the major portion of your activity or do you have other activities?

A. Well, my law practice is the major, takes the major portion of my time, of course. I do have other activities. At the present [142] time do you want to know?

Q. Well, at the present time and during the period from April 1954 to the period covered by this action.

A. Well, in April of 1954, I was president of WKRZ, Incorporated, a radio station operating in Oil City, Pa., and also counsel for the station. I have a 50 percent interest in Radio Station WKBI in St. Mary's, Pa., in partnership with Cary Simpson.

Q. With respect to that station, do you have any part in its operation at all?

A. No, I am what is known in law as a silent partner. I mean, I don't have any time to devote to the operation and by agreement between Mr. Simpson and myself, he took over from the very beginning the full responsibility of the management and operation.

* * * * *

[143] Q. During the period from April 1954 through 1955, the time covered by this proceeding, how much time were you able to devote, did you devote to WEMR on an average?

A. You are speaking personally of my——

Q. Your own activity.

A. Of my own activity. I would say probably on an average of three to five hours a week would be the greatest time.

Q. Where would that time be spent?

A. In the Pittsburgh office.

Q. During the period from April 1954 through 1955, how many times would you say you had been at the station in Emporium?

A. I would say seven or eight times.

Mr. WEINER. What period was that?

Mr. LEVIN. From April 1954 through 1955. That's the time covered in this action.

Q. How long a time would you be there in any single instance?

A. Well, I was in Emporium, to the best of my knowledge, on April 28th, 1954, from 11:10 a. m. to 11:17 a. m. I stopped there on my way to Leominster, Massachusetts.

Q. On other occasions when you'd be there, did you spend——

A. Then I was on May 5th, to the best of my knowledge, 1954, for about five minutes on my return trip from Leominster, Massachusetts. Then I was there again on May 15, 1954, [144] to investigate a complaint that the F. C. C., the Federal Communications Inspector, had inspected the station and found it operating without a license, licensed operator.

Q. Who was the manager at that time?

A. Well, the man in charge of the station at the particular time of the inspection was Mr. Doelicke.

Q. How much time did you spend on that occasion?

A. I spent about an hour with Mr. Doelicke and Mr. Weber. Mr. Weber was called in during the course in the inspection by Mr. Halloway of the Federal Communications Commission, the district engineer.

Q. Let's just leave the details of that for the time being. After that, were you in Emporium?

A. Yes, the next time I was in Emporium was in June. I took a Mr. Joe Gearing from Pittsburgh whom I hired as an announcer to Emporium.

Q. How much time were you there at that time?

A. Well, I spent about—I would judge I was there 45 minutes.

Q. On subsequent occasions without specifying the particular date, how much time would you spend on each visit?

A. Then I went back to Emporium the next day after I took Mr. Gearing up and the reason that I did, the reason I went back, Mr. Gearing didn't have a license and I went to Oil City to see if a license had been sent there for him and I went back the next day for a period of probably an hour.

[145] Q. Subsequent to that time what other visits?

A. In July of 1954, I went to Emporium with a station wagon to pick up some copper wire that had

been used in the construction of the station and I was there for about fifteen minutes, just long enough to load the copper wire and leave. Then I went down in August of 1954. I was in Emporium with Mr. Weber, Mrs. McLaughlin, for a period of oh, possibly two hours.

Then I was in Emporium in October of 1954, I think about the 24th day of October, to see Mr. Fowler, who had been engaged as an engineer, to meet the man and talk with him.

Q. After October, were you in Emporium for a couple of months?

A. No, I was not in Emporium in 1954 until May the—I believe it was the 28th of May, 1955.

Q. Then subsequent to May in 1955, how many times would you say you were there?

A. Well, I was there on an average of possibly once every two weeks after that.

Q. For how long a time?

A. For a period of about six months.

* * * * *

[162] Q. Can you clarify your instructions to Mr. Agnello?

A. Yes, I can. I advised each employee that they could work forty hours per week at regular time and that any time over forty hours would be on a time and a half basis and that they should get permission to work the overtime, in the event of an emergency they should work the overtime and place it on their time sheet, the reason for it, and on the back of the time sheet I set forth instructions to that effect.

Q. Did you make a point of limiting them to the required number of hours?

A. No, I did not. That's impossible in the radio business.

* * * * *

[163] Q. Whose duty was it to make sure that the time schedules were observed by the employees of WEMR?

A. Well, normally the station manager would be responsible for it, I mean he was the police officer. I was not present. We relied on the honesty of the employees.

* * * * *

[166] Q. Did you have any discussion with him at that time concerning his own hours?

A. Yes, I asked him what he was doing in the time that he was showing on his time sheets and he indicated to me how he spent his time.

Q. Did he indicate to you what his own schedule of working hours was at that time?

A. Yes, he did.

Q. What did he tell you?

A. Well, he said his normal day was to have breakfast in the coffee shop in Emporium at approximately 10:50 a. m. and that at approximately eleven o'clock a. m., he would stop at any place of business that needed advertising or had called in the station and he would stop to pick the copy up or talk advertising and then after he finished his conversation or his calls he would go to the station in Emporium and do a twelve o'clock newscast, it was on from twelve to twelve-fifteen.

Then he was finished at—well he worked over part-time while the man was at lunch. I think he worked until one o'clock—that's right—while the man was at lunch as a relief man. Then he went out back home and he would stop if he had to go back home to pick up copy if there was any calls came in that morning.

[167] Q. Did he tell you what his schedule was later in the day?

A. Yes, after his schedule was tentatively 5:15 or 5:45 it alternated in the evenings till some time 11:15 or 12:00 o'clock and he said in the evenings he would help the boys down at the station, he would do the six-o'clock news, he would select records shows for the man for programming and he would do, write copy and that he would do billing at the end of the month for an hour, an hour and a half.

Q. Do you know whether during those evening hours he was the only employee on duty at the station or not?

A. No, I know from the time sheets there were two employees on duty.

Q. It would only be necessary for one to actually operate and announce, is that right?

A. That's correct.

* * * * *

[178] Q. Your testimony that you gave on direct examination indicates that you were at the station in Emporium a total of seven times during the period April, 1954 when the station first went on the air until October, 1954, is that correct?

A. That's correct, I said seven or eight times, I believe.

Q. And that you were not in Emporium from October, 1954 to May 28, 1955?

A. No, sir, I was not.

Q. How did you know that the time sheets that were being submitted to you were or were not accurate?

A. I assumed they were correct.

[179] Q. On what basis did you make your assumption?

A. On the honesty of the employees.

Q. Was that the only assumption?

A. That plus checking on the telephone and conversation with Mr. Doelnicke and correspondence from Mr. Doelicke.

Q. Did you check with anyone else with respect to the hours worked?

A. Yes, I checked with some people in the St. Mary's station.

Q. In the St. Mary's station?

A. That's right.

Q. What station?

A. WKBI.

Q. Where is that located, St. Mary's?

A. St. Mary's.

Q. With whom did you check there?

A. I checked with Mr. Simpson, the manager.

Q. With respect to what?

A. With respect to the people that were on the air at Emporium, the approximate times he heard them on the air. He would go through Emporium to see the Coudersport station several times a week and he had one of his employees lived in Emporium that worked at the St. Mary's station.

Q. Would that checking give you information with respect to the amount of time that was spent in selling advertising or in writing script or in programming or in billing activities?

[180] A. I would say it would, yes.

Q. How?

A. From my instructions to these employees, I assumed that they were following instructions when they were turning their time sheets in direct.

Q. You are not answering my question. How would checking with St. Mary's give you information with respect to the amount of time spent in selling and in these other activities engaged in by these employees at Emporium?

A. Just generally.

* * * * *

[184] A. I assume he was, yes.

Q. Did you know about that?

A. Yes, I can tell from the bank deposits that came in, the bank deposit sheets, who he was selling to.

Q. Exactly. Therefore you had knowledge of the people with whom he was doing business in relation to selling advertising for station WEMR?

A. That is a difficult question to answer.

Q. Well, don't you know the names of the people?

A. Yes, but there was also other people selling besides Mr. Doelnicke down there. Mrs. Lasseo testified she had been down there to sell. I believe Mrs. McLaughlin had been down there to sell. I had sold advertising down there. I can't tie any direct account to Mr. Doelnicke's selling.

By the COURT:

Q. How many days did you spend selling advertising in Emporium?

A. I was in Emporium from approximately, let's see, it was about August of 1953 until March of 1954. I supervised the erection of the tower, the building of the building.

By Mr. WEINER:

Q. Wait a minute. The question was, how much time did you spend selling advertising?

A. All right, all this time I was talking advertising to the merchants of Emporium.

Q. Did you sell a contract?

[185] A. Yes, they promised us advertising down there and we received it.

Q. Did you consummate any contracts for advertising?

A. I never personally signed any contracts. I turned it over to whoever was selling down there, Mrs. McLaughlin principally.

Q. How much time did you spend on an average in a week selling in Emporium?

A. Well now——

Q. Your best estimate of the time?

A. I would say, I have to break it into two parts. I spent very little time selling subsequent to the time the station went on the air until June of 1955. Then the station was off the air in 1955 due to not having a licensed engineer at the station and I went down in June to rehabilitate the operation and at that time I spent, oh, I would say on ten occasions I contacted the merchants down there, Brown's Boot Shop, the manager, and Emporium Hardware and I talked to Mr. Taylor at the Emporium Trust Company. We had a long discusion about advertising and I talked to Olson's, which is a card shop in town and I was in the—talked advertising to the—

Q. How much time did you spend in this activity?

A. I would say ten times in about three hours, would be thirty hours, I'd say.

Q. Thirty hours a week?

A. Thirty hours for the whole time.

[186] Q. For the whole time?

A. That's right.

Q. For the entire time you were in Emporium?

A. No, that was in June of 1955 until the station went on the air.

Q. How much time did you spend in Emporium selling advertising before the station went on the air?

A. It was from August 1953 till March of 1954, every weekend.

Q. Every weekend?

A. Every weekend.

Q. When did you sell advertising on the weekends?

A. On Saturdays when I would go to these places to purchase merchandise.

Q. Is Saturday a busy day in Emporium?

A. Fairly so, yes, sir.

Q. Would you have time to speak to businessmen for selling of advertising?

A. When I was buying nails, when I was buying lumber, when I was having meals, I was talking radio and advertising.

Q. You say in September of 1954 Mr. Doelnicke was given the job of managing the station in Emporium, is that correct?

A. That's correct, yes.

Q. In November Mr. Burton was hired and in November of 1954 Mr. Doelnicke was hired. Who hired these employees?

A. Why Mr. Doelnicke hired them, hired the employees.

* * * * *

[198] Cross examination by Mr. WEINER:

Q. Mr. Rennekamp, you say you surrendered your license to operate WEMR to the Federal Communications Commission?

A. Yes, sir, that's correct.

Q. That was done in October of 1956?

A. Well, I am not sure of the exact date, Mr. Weiner. It was done through our Washington law firm. We have a law firm, Welch, Mott and Morgan in Washington, D. C. that represents stations and they surrendered the license by letter.

Q. Sometime in October of 1956?

A. When we went off the air in 1956, yes.

Q. Does that mean you cannot reapply for that license again or for any license again for a radio station?

A. Oh, no, that wouldn't prevent me from applying for a radio station.

By the COURT:

Q. Do you still own the property or did you own the property where the transmitter is?

A. No, I didn't own the property. My wife owned the property down there. I didn't own the property.

Q. Does she still own it?

A. Yes, she's selling it right now to a neighbor down there. It was still there. They had an explosion. I haven't been out there.

Q. Is there any equipment on it, the buildings still on it?

A. Yes, the building is still there. It was the last time I was down.

Q. Is there any other equipment on it beside the building?

A. No, the old transmitter is still in the building.

* * * * *

[200] By the COURT:

Q. Did you say you had an interest in WKBI in St. Mary's?

A. I have 50 percent.

Q. Also in Oil City?

A. I am a stockholder in Oil City corporation, yes, sir.

* * * * *

[201] By Mr. WEINER:

Q. Do you have any interest in any other radio station?

A. At the present time?

Q. Yes.

A. I have some stock in the Latrobe Broadcasters, Incorporated.

Q. What?

A. The Latrobe Broadcasters, Incorporated. It's a corporation that owns the station in Latrobe, Pa.

* * * * *

[206] By the COURT:

Q. Well now, let's see, does the income from the station, the gross income, come from advertising?

A. Yes, it does, sir.

Q. You had to have advertising in order to operate?

A. That's right.

Q. Somebody had to be out constantly selling?

A. That's correct.

Q. Getting advertising copy, getting it into the station?

A. That's correct.

Q. Who wrote the advertising copy?

A. Sometimes the merchants had a form of copy, sometimes the merchant himself had a national advertiser like Brown's Boot Shop would have a copy service.

Q. Somebody had to look after the advertising to see it was in shape so the announcer could put it on the air?

A. Whatever little advertising.

Q. That's what you depended on?

A. That's right.

Q. You didn't do any selling, only thirty hours?

A. I actually was out selling. Before that, I was out in 1953 and 1954 when we were building the station, soliciting advertising.

[207] The COURT. You see, the point is from what his testimony has been in the case, what his defense has been here, I don't see how you are going to get this witness to say because he produced, we will say, certain copy, and the station wasn't successful, that there wasn't somebody out selling advertising.

* * * * *

[209] The COURT. On the subject, on the precise issue and that is whether they put in extra time. That is overtime, over and beyond the time that they reported, that is the heart of this case. This man can't deny, he can't seem to deny, he doesn't know it, he wasn't there. I'd like to have you put on if you have got any testimony, that they didn't do this work. Otherwise, the preponderance of [201] this case is just as plain as you and I, the three of us sitting here.

[250] The COURT. Well, now, gentlemen, I want to say this: That this case can be decided now just as well as any other time so far as the facts of the case are concerned. It is a civil case. It's like any other civil case. It depends upon the preponderance of the evidence and comparison and weight of the testimony. That's all there is to it.

I again point out to Mr. Rennekamp that he is a lawyer, he knows it is not a criminal action. There's just no defense here, no defense to the Government's proof in the case, as I view it. He might have issued instructions and all that sort of thing, but the weight of the testimony, these men he had up there and his manager particularly just simply put in more time and it seems to me he should have known it and he is bound by it, whether he did or did not know about it.

I think under all of the evidence, the Government is entitled to relief and the injunction. It is a civil action. So you present your findings of fact and conclusions of law and we will enter the order.

Mr. WEINER. I will, Your Honor.

Mr. LEVIN. Will Your Honor hear a short argument at this point?

The COURT. I stated the Court's view of the evidence. Do you want to talk about the evidence?

Mr. LEVIN. Yes.

[251] The COURT. Go ahead.

Mr. LEVIN. I'd like to indicate since Your Honor has indicated the weight of the evidence is to be considered, I would like to point out some discrepancies which I think are significant.

Mr. LEVIN. I would point out to Your Honor in the cross examination of Mr. Dolnack, that was the chap that testified after Burton, when he was asked about a certain time sheet and I think that's the crux of this whole situation, he said that Doelnicke told him not to show that because he didn't want Rennekamp to find out that they had been working extra hours. I don't know if Your Honor noted that statement.

[252] Mr. WEINER. No, there wasn't anything about overtime. There was an overlap.

Mr. LEVIN. Whatever it was, they didn't want Rennekamp to find out about it.

The COURT. I took that to be, they understood Rennekamp said to them, here you have got so many hours a week to work. That's all you report. If you work over that, don't let me know about it, but get advertising in and keep the station on the air.

Mr. LEVIN. I submit to Your Honor that it is not a fair assumption.

The COURT. That's what the proof indicates to me, hearing all the proof.

Mr. LEVIN. I think the proof indicates probably these men did work longer, but there is nothing at any point to indicate Mr. Rennekamp insisted they work longer, they did it on their own in order to make the station a going proposition, and didn't want Mr. Rennekamp to know. It seems to me that's evidence of collusion.

The COURT. I think the whole record indicates they worked longer hours than what they reported and I think the records are inaccurate. I think Mr. Rennekamp is bound to know what those men do up there. It is a civil case.

[254] Mr. LEVIN. We have the further point, of course, which I think is not in dispute but the evidence shows in October of 1956, this station is closed, dismantled, license surrendered and that's the end of it, so there is no problem with respect to WEMR which requires the relief sought.

The COURT. Of course, Judge Dobie's opinion there answered that proposition. This man is, of course, still in the radio business, broadcasting business. I don't know, it's one of those things the Government is entitled to this it being a civil action, he is going to comply with the law. It isn't a hardship to him. I don't know why the injunction——

Mr. LEVIN. It is a hardship, an injunction against [255] him would be a hardship, as far as any other activities covered, WKRZ is covered for itself, its employees and so forth, so there is no need——

The COURT. I think the way he operated this station, to my mind the evidence in this case shows very clearly he didn't just bother with this business or else he very cutely kept it outside of his record. One thing or the other. It's either one thing or the other. He was either careless, didn't pay any attention to it or else he very sagaciously, we will say, saw there wasn't any record there that would incriminate him in any way. Its either one thing or the other. I mean it's one of these things. We can talk about it for a week.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

This action was heard by the Court without a jury on January 16, 17, and 18, 1957. After carefully considering the entire record and arguments of counsel, the Court made the following:

FINDINGS OF FACT

1. On April 25, 1956, plaintiff, James P. Mitchell, Secretary of Labor, United States Department of

Labor, brought this action in his official capacity to restrain defendant Kenneth E. Rennekamp, doing business as Radio Station WEMR, from violating the minimum wage, overtime, and record-keeping provisions of the Fair Labor Standards Act of 1938, as amended (52 Stat. 1060, U. S. C. A. Title 29, Sec. 201, *et seq.*), hereinafter referred to as the Act.

2. The complaint alleged that defendant between April 18, 1954, and the time of filing this action on April 25, 1956, paid his employees engaged in commerce or in the production of goods for commerce less than the minimum rates provided for in Section 6 of the Act and in violation of Sections 6 and 15 (a, (2) of the Act; that defendant in the said period worked certain of his employees engaged in commerce or in the production of goods for commerce in excess of the maximum hours provided in Section 7 of the Act, and failed and refused to compensate said employees for their overtime at the rates provided for in the Act and in violation of Sections 7 and 15 (a) (2) of the Act; that defendant had failed to make and keep records as prescribed by regulations issued by the Administrator of the Wage and Hour Division, United States Department of Labor, and by so doing violated the provisions of Sections 11 (c) and 15 (a) (5) of the Act.

3. During the period alleged in the complaint, defendant operated a radio broadcasting station, WEMR, at Emporium, Cameron County, Pennsylvania, having a power of 100 watts under license issued by the Federal Communications Commission. In his answer defendant denied that the radio station was broadcasting in interstate commerce and denied that he was violating any provisions of the Act.

4. Defendant is a member of the Associated Press, a non-profit membership corporation organized under

the laws of the State of New York for the purpose of gathering news nation-wide and throughout the world and distributing that news to its members for publication in their newspapers and for broadcasting over their radio stations. This national and world-wide news is gathered by correspondents and employees of the Associated Press and is transmitted to the appropriate bureau headquarters located in New York, Philadelphia, Pittsburgh, and elsewhere, to be forwarded to its members. In order to communicate with its members the Associated Press uses a wire system consisting of thousands of miles leased from Western Union and the American Telephone and Telegraph Company. Cable, messengers, and mail are also used as a means of communication, both in receiving and transmitting news to Associated Press members. The Associated Press lines of communication are utilized throughout the 24-hour period every day. Under an agreement dated December 13, 1953, the Associated Press agreed to furnish defendant at Radio Station WEMR the special Associated Press radio news service wire report for broadcasting. The Associated Press maintains a teletype machine in defendant's radio station in Emporium, Pennsylvania, to deliver its news report to Station WEMR. These reports are received 24 hours a day, every day in the week except Sunday.

5. Defendant employed numerous employees in and about the said place of business in Emporium, Pennsylvania, in the operation of Radio Station WEMR. These employees were employed as announcers, engineers, combination announcer-engineer, and they performed such duties as editing Associated Press news reports received on the teletype machine at the radio station, broadcasting news reports at regular intervals every day in the week except Sunday, operation and

maintenance of transmission equipment, preparation of commercials, and sale of advertising for defendant's radio station.

6. The minimum wage provisions of the Act were repeatedly violated in regard to the following employees: Robert Curt Doelicke, announcer-station manager, who also spent a substantial portion of his time selling advertising; Albert P. Burton, announcer-engineer; George E. Dolnack, announcer-engineer; James Agnello, announcer, who also spent a substantial part of his time selling advertising; and Mrs. Betty Lesco, sales representative. All of these employees, during the period in question, worked varying hours ranging from three to ten hours per week in excess of time shown on defendant's time sheets and payroll records for which time they were paid nothing.

7. The overtime provisions of the Act were repeatedly violated with respect to all the aforementioned employees who were paid a weekly salary (paid twice a month) regardless of the actual number of hours worked in any given workweek. They frequently and repeatedly worked longer hours each workweek than those specified by Section 7 of the Act and never received excess additional compensation for such excess hours over and above their weekly salaries. These employees who were "scheduled" by the defendant to work a 45¼- or a 48-hour workweek were likewise paid a fixed weekly salary (paid twice a month) which was broken down on the defendant's payroll records to show an hourly rate for the first forty hours and an additional half-time for the hours in excess of forty. However, all of the aforementioned employees actually worked in excess of the "scheduled" hours shown on their time sheets and on defendant's payroll records, but were not compen-

sated for these overtime hours in excess of the "scheduled" hours shown on defendant's time sheets.

Thus, Robert Curt Doelicke, employed from April 1954 to May 1955, worked at least 60 hours per week including hours worked "on their air", selling advertising, writing script, programming, writing commercials, billings, etc. However, said employee showed only 8 hours a day for six days a week or a total of 48 hours on the time sheets signed and submitted by him to defendant's Pittsburgh office, and he received the same pay each pay period irrespective of the hours actually worked each week. He was always paid $65.00 a week or $130.00 on a bi-weekly basis. This was broken down to show payment for the first 40 hours at $1.25 per hour or $50.00 straight time earnings and $1.87½ an hour for the 8 overtime hours or $15.00 for the overtime compensation.

Employee Albert P. Burton was employed from November 1954 to May 1955. His actual hours of work were approximately 54 per week for a substantial period of his employment. Time sheets and payroll records for this employee, however, showed that he worked only 45¼ hours per week. This employee always received $60.00 per week or $120.00 biweekly irrespective of the number of hours actually worked in any workweek.

Employee George E. Dolnack was employed by defendant between November 1954 and July 1955. Most of the time of his employment he was paid $1.00 per hour for a workweek scheduled by defendant for 48 hours and shown on the time sheets and payroll records as 8 hours per day, six days per week, Monday through Saturday. On this basis he was always paid a salary of $52.00 per week representing $40.00 for the first 40 hours and $12.00 for the overtime hours. Said employee for a substantial period of

his employment actually worked in excess of 48 hours per week for which he was paid no additional compensation.

Employee James Agnello was employed from August 1955 to October 1956. In addition to his duties "on the air" he also was instructed by defendant to sell advertising for the radio station. His time sheets and payroll records consistently showed 40 hours per week at an hourly rate of $1.25 or a total of $50.00 per week. Said employee during the period September 1955 to February 1956 regularly worked in excess of 40 hours per week but was paid no additional compensation for such overtime hours during this period of his employment.

8. The defendant kept inaccurate records of daily and weekly hours of work in that he instructed his employees directly or through the station manager to show a specified or "scheduled" number of hours each week, which specified or "scheduled" number of hours was frequently less than the number of hours they actually worked and less than the time required to perform their assigned duties both "on the air" or otherwise, including such duties as selling advertising, remote control broadcasts, and special request shows.

9. On October 20, 1956, defendant dismantled Radio Station WEMR and subsequently was notified by the Federal Communications Commission that the license to operate Radio Station WEMR was cancelled and that the call letters WEMR were deleted.

10. Title to the building and property which housed the radio station continues to be held in the name of defendant's wife and defendant continues to own or have an interest in other radio stations including a 50% interest in Radio Station WKBI, St. Marys, Pennsylvania, in which defendant is a partner, and in Radio Station WKRZ, Oil City, Pennsylvania, of which corporation defendant is the President.

11. On September 16, 1954, a consent decree was entered in the case of *Mitchell* v. *WKRZ*, in the United States District Court for the Western District of Pennsylvania, at Civil No. 9682, enjoining defendant corporation and its officers, agent, etc., from violating Sections 6, 7, and 15 (a) (3) of the Act. Entry of this decree was consented to by Kenneth E. Rennekamp, President, and David R. Levin, Attorney for the Corporation.

CONCLUSIONS OF LAW

1. The jurisdiction of this cause of action and of the parties herein is conferred upon the Court by Section 17 of the Fair Labor Standards Act of 1938, as amended (Title 29, U. S. C. A., Sec. 201, *et seq.*), hereinafter referred to as the Act.

2. Defendant's employees engaged in the receipt, handling, editing, and broadcasting in Pennsylvania of news and information from nationwide and worldwide sources are engaged in interstate transmission and communication of news and are, therefore, engaged in interstate commerce within the meaning of the Act. *Lorain Journal* v. *U. S.*, 342 U. S. 143; *Walling* v. *Sun Publishing Company*, 47 F. Supp. 180, affirmed 140 F. (2d) 445, cert. denied 322 U. S. 728.

3. Defendant's employees whose duties included announcing, keeping radio logs, scheduling programs, writing script, preparing commercials; employees employed as engineers to operate radio transmitting equipment, to take meter readings and to maintain the technical equipment of the radio station, and salesmen to sell advertising and to prepare commercials for broadcasting over defendant's radio station are engaged in interstate commerce within the meaning of the Act. *Walling* v. *Sun Publishing Company*, supra; *Fleming* v. *Capital Broadcasting Co., Inc.*,

U. S. D. C. Ala., 3 LO (CCH) 60, 340; *Cummins* v. *Carteret Broadcasting Co., Inc.*, U. S. D. C. E. D. N. C., 137 F. Supp. 547 (January 27, 1950).

4. The facts in this case shown by a preponderance of the evidence that defendant violated the minimum wage provisions contained in Sections 6 and 15 (a) (2) of the Act.

5. Defendant violated Sections 7 and 15 (a) (2) of the Act by failing and refusing to credit any pay his employees for all overtime hours actually worked.

6. An employer subject to any provision of the Act is required to make, keep, and preserve records of the actual number of hours worked by his employees and of the other information prescribed in Regulations Part 516 of the Administrator of the Wage and Hour Division issued pursuant to Section 11 (c) of the Act. He cannot escape this duty by delegating it to others. The personal non-delegable duty rests on him to inquire into the conditions prevailing in his business and he is not relieved of this duty because the extent of his business may preclude his personal supervison and compel reliance on subordinates. The employer does not discharge his duty by the mere promulgation of a rule. The scheduled hours shown on time sheets signed and submitted by employees to defendant's office in Pittsburgh cannot be considered adequate and accurate records where the employer knew or should have known that they did not reflect the actual hours worked. *Walling* v. *Sun Publishing Company*, supra.

7. Defendant failed to maintain the records of daily and weekly hours actually worked by employees as required by Regulations Part 516 issued by the Administrator of the Wage and Hour Division. The maintenance of innacurate records by defendant as to the actual number of hours worked by many of his employees

resulted in violation of Sections 11 (c) and 15 (a) (5) of the Act.

8. Discontinuation of an illegal practice by a defendant either by going out of business or otherwise after the institution of legal proceedings against the defendant by a public agency does not render the controversy moot. This is particularly true where the challenged practices are capable of repetition. *Walling* v. *Haile Gold Mines, Inc.*, 136 F. (2) 102 (C. A. 4). The discontinuance by the defendant of the operation of Radio Station WEMR does not constitute a basis for dismissal of this action on the facts of this case. The mere suspension of operations by defendant of Radio Station WEMR carries with it no assurance that operations may not be resumed by him in the future at Emporium, Pennsylvania, or at some other place.

9. The plaintiff is entitled to a judgment granting relief in accordance with these findings of fact and conclusions of law.

U. S. GOVERNMENT PRINTING OFFICE: 193